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LEISURE FARM CORPORATION SDN BHD

v.

KABUSHIKI KAISHA NGU & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
HASNAH MOHAMMED HASHIM J
[SUIT NO: 22NCC-1074-07-2012]
10 JUNE 2013

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CIVIL PROCEDURE: *Injunction - Mareva injunction - Principles applicable - Requirements in Creative Furnishing Sdn Bhd v. Wong Koi - Full and frank disclosure of all material facts - Good and arguable case - Real risk of dissipation of assets - Defendant company owned and controlled by foreign nationals - Mareva injunction granted pending claim for specific performance of share sale agreement*

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The plaintiff was a company registered in Malaysia. The first defendant was a company incorporated in Japan. The second defendant was a company incorporated in Malaysia and owned a piece of land. The plaintiff and the first defendant had executed a memorandum ('the memorandum') where it was agreed that the first defendant would sell and the plaintiff would purchase the entire issued shares of the second defendant for the price of USD24.3 million. Amongst the terms of the memorandum was that a sale and purchase agreement ('SPA') for the sale of the shares would be executed. However, the first defendant subsequently refused to execute the SPA. The second defendant then proceeded to enter into an SPA with the third defendant to sell a portion of its land to the third defendant. A sum of RM7,840,800 was paid by the third defendant into the second defendant's bank accounts being 10% of the purchase price for the land. The plaintiff thus filed a suit for specific performance claiming, *inter alia*, that a binding agreement between the plaintiff and the first defendant had been concluded for the sale and purchase of the second defendant's entire issued share and by extension, the land owned by the second defendant. The plaintiff *vide* encl. 72 applied for a *Mareva* injunction to restrain the second defendant from dissipating its assets within the jurisdiction including the balances in the bank accounts. The second defendant *vide* encl. 80 applied to set aside the *ex parte Mareva* order granted by the court.

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Held (allowing encl. 72 and dismissing encl. 80 with cost):

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(1) The Supreme Court in *Creative Furnishing Sdn Bhd v. Wong Koi* has set out the requirements the respondents must satisfy the court in order to get a *Mareva* injunction. In order to establish the necessary ingredients for an *ex parte* order in particular, it is incumbent on the

applicant to make frank and full disclosures of all material facts. Every material representation must not be misleading, and there must not be any suppression of material facts. Failure to do so at the crucial time of making the *ex parte* application would invariably be fatal; *KSM Credit & Leasing Sdn Bhd v. Datamaute (M) Sdn Bhd & Ors* (refd). (para 24)

(2) In granting *Mareva* injunction, the test to be applied is whether, after the plaintiff has shown that he has a good and arguable case and after considering the whole of the evidence, the refusal of a *Mareva* injunction would involve a real risk that a judgment or award in the plaintiff's favour would remain unsatisfied because of the defendant's removal of assets from the jurisdiction or dissipation thereof within the jurisdiction; *Jasa Keramat Sdn Bhd v. Monatech (Malaysia) Sdn Bhd* (refd). (para 25)

(3) The plaintiff need not satisfy the court that the plaintiff's case was so strong as to warrant summary judgment nor even a strong *prima facie* case to obtain a *Mareva* order. (para 26)

(4) The principal issue to be decided at the full trial was whether an agreement was concluded between the plaintiff and the first and second defendants. The second defendant executed the agreement with the third defendant despite having full knowledge of the plaintiff's interest in the land. Based on the facts and evidence, the plaintiff had a good and arguable case. (paras 26, 28 & 29)

(5) The second defendant was a company incorporated in Malaysia and was wholly-owned by the first defendant which was company incorporated in Japan and was outside the jurisdiction of the court. The majority of the directors in the second defendant were Japanese nationals. From the evidence, there was a dissipation of assets. Monies had been transferred from the second defendant's account to an account in Singapore. (paras 27 & 33)

Case(s) referred to:

Aspatra Sdn Bhd & Ors v. Bank Bumiputra (M) Bhd & Anor [1987] 2 CLJ 377; [1987] CLJ (Rep) 50 SC ***(refd)***

Biasamas Sdn Bhd & Ors v. Kan Yan Heng & Anor [1998] 4 CLJ 754 CA ***(refd)***

Creative Furnishing Sdn Bhd v. Wong Koi [1989] 2 CLJ 93; [1989] 1 CLJ (Rep) 22 SC ***(refd)***

Jasa Keramat Sdn Bhd v. Monatech (Malaysia) Sdn Bhd [1999] 4 CLJ 30 HC ***(refd)***

KSM Credit & Leasing Sdn Bhd v. Datamaute (M) Sdn Bhd & Ors [1986] 1 CLJ 500; [1986] CLJ (Rep) 414 HC ***(refd)***

Pacific Centre Sdn Bhd v. United Engineers (M) Bhd [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 HC ***(refd)***

Third Chandris Shipping Corporation v. Unimarine SA [1979] QB 645 ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 29 r. 1(2A), O. 92 r. 4

For the plaintiff - Lim Koon Huan (Teoh Choon Hui, Nicholas Lai with her); M/s Skrine
For the defendant/appellant - Ang Hean Leng (Carmen Tan Chia & R Rishikessingam with him); M/s Abdul Rahman Saad & Assocs

Reported by Amutha Suppayah

JUDGMENT

Hasnah Mohammed Hashim J:

Enclosure 72

[1] Enclosure 72 is the application of the plaintiff for the following orders:

(a) That the second defendant whether by itself or its officers, servants or agents or otherwise howsoever be restrained by injunction until trial in this action or until further order from selling, disposing of, mortgaging, assigning or transferring, pledging or charging or diminishing or in any way howsoever dealing with any of the assets of the second defendant within the jurisdiction including but not limited to:

(i) credit balances or balances up to a sum of RM7,840,800 in any account in the name of the second defendant (whether severally or jointly with any third parties) or in which the second defendant have an interest (in whatsoever capacity) with Malayan Banking Berhad, Johor Bahru City Square Branch, 108 Jalan Wong Ah Fook, 80000 Johor Bahru, or any other branch of the said bank or in any other banks or financial institutions in Malaysia;

(ii) fixed deposit accounts up to a sum of RM7,840,800 held by Malayan Banking Berhad or any other deposit accounts at the said branch or any other branch of the said bank or in any other banks or financial institutions in Malaysia in the name of the second defendant (whether severally or jointly with any third parties) or in which the second defendant has an interest (in whatsoever capacity);

(iii) nothing in this order shall prevent Malayan Banking Berhad or any other banks or financial institutions from exercising any right of set-off it may have in respect of facilities afforded by it to the second defendant prior to the date of this order;

(b) That the second defendant be ordered to provide full, complete and accurate accounts of the deposit sum of RM7,840,800 that was paid by the third defendant to the second defendant on 11 September 2012 in relation to the sale and purchase agreement dated 11 September 2012 (third defendant's SPA) for a portion of HSD 195059 PTD 59410 PTD 59409, Mukim of Pulai, District of Johor Bahru and to provide and disclose the details and particulars of all the recipients and/or transferees and/or persons (including their names, addresses and dates and the amounts received by the respective parties therein) who have received and/or benefited from either directly and/or indirectly the deposit sum of RM7,840,800 pursuant to the third defendant's SPA;

(c) That the second defendant do within seven days from the service of this order give a full account and disclosure of the funds of the second defendant held in accounts and fixed deposit accounts registered in the name of the second defendant or in the names of other third parties controlled or directed by the second defendant or otherwise howsoever and that such disclosure be made by the second defendant on oath by way of affidavit to be filed in this Honourable Court; and

(d) Alternatively, an order that the second defendant deposit and/or pay the sum up to the value of RM7,840,800 to an interest-bearing fixed deposit account held by the court's appointed stakeholders pending the final disposal of this action, within seven days from the date of the order made herein.

Enclosure 80

[2] Enclosure 80 is the application by the second defendant pursuant to O. 29 r. 1 of the Rules of Court 2012, O. 92 r. 4 of the Rules of Court 2012 and/or the inherent powers of the court for the following orders:

(a) that the following part of the *ex parte* Mareva order dated 22 February 2013 be set aside and/or suspended pending the disposal of the *inter partes* hearing of the plaintiff's notice of application dated 19 February 2013 ("encl. 72").

AND IT IS FURTHER ORDERED that the 2nd Defendant do provide full, complete and accurate accounts of the deposit sum of RM7,840,800.00 that was paid by the 3rd Defendant to the 2nd Defendant on 11.9.2012 in relation to the Sale and Purchase Agreement dated 11.9.2012 (3rd Defendant's SPA) for a portion of HSD 195059 PTD 59410 PTD 59409, Mukim of Pulai, District of Johor Bahru and to provide and disclose the details and particulars of all the recipients and/or transferees and/or persons (including their names, addresses and dates and the amounts received by the respective parties therein) who have received and/or benefited from either directly and/or indirectly the deposit sum of RM7,840,800.00 pursuant to the 3rd Defendant's SPA AND IT IS FURTHER ORDERED that the 2nd Defendant do within seven (7) days from the service of the Mareva Order give a full account and disclosure of the funds of the 2nd Defendant held in accounts and fixed deposit accounts registered in the name of the 2nd Defendant or in the names of other third parties controlled or directed by the 2nd Defendant or otherwise howsoever and that such disclosure be made by the 2nd Defendant on oath by way of Affidavit to be filed in this Honourable Court AND IT IS FURTHER ORDERED that alternatively, the 2nd Defendant do deposit and/or pay the sum up to the value of RM7,840,800.00 to an interest-bearing fixed deposit account held by the Court's appointed stakeholders pending the final disposal of this action, within 7 days from the date of this [Order].

(b) that the cost be provide for; and

(c) such order or further orders that is deemed just and necessary.

[3] Cause Papers

(a) Affidavit in support affirmed by Yong Wan Seong of the Mareva injunction dated 19 February 2013;

(b) Affidavit in support affirmed by Quay Chew Keong of the intervener's application dated 10 March 2013;

(c) Affidavit in support affirmed by Lai Ming of the injunction application dated 6 September 2012;

(d) Notice of intention to use Quay's and Lai Ming's affidavits;

(e) Affidavit in reply of Masaki Hashimoto affirmed on 5 March 2013;

(f) The *ex parte* Mareva order dated 22 February 2013;

(g) The plaintiff's statement of claim dated 9 October 2012; and

(h) The second defendant's affidavit in support affirmed by Masaki Hashimoto on 4 March 2013 in support of the first setting aside application.

[4] After hearing and considering the submissions of the plaintiff the *ex parte* order was granted on 22 February 2013. Both encls. 72 and 80 were fixed and heard *inter partes* on 6 March 2013 and continued on 18 and 19 March 2013.

The Plaintiff's Arguments

[5] The plaintiff is a company registered in Malaysia. The first defendant is a company incorporated in Japan. The second defendant is a company incorporated in Malaysia. The second defendant operates a golf resort and manages the membership of the said golf resort. The asset belonging to the second defendant is a piece of land held under:

(a) GRN 333802, Lot 74596 Mukim Pulai;

(b) HSD 195059, PTD 59409 and PTD 59410 Mukim Pulai;

(c) GRN 333816, Lot 74593 Mukim Pulai;

(d) GRN 333817, Lot 74594 Mukim Pulai; and

(e) GRN 333818, Lot 74595 Mukim Pulai.

("the said land").

[6] By a Memorandum of Understanding dated 8 December 2011 the plaintiff and the first defendant agreed to negotiate the potential sale and purchase of the entire issued shares of the second defendant (MOU). It is specifically provided in the said MOU that the terms therein are non binding. The parties then engaged in active negotiations and due diligence were conducted on the defendants in Japan, Singapore and Malaysia. On 16 March 2012 the plaintiff and the first defendant executed a memorandum in Hong Kong ("the Hong Kong Memorandum") where it was agreed that the first defendant sell and the plaintiff agree to purchase the entire issued shares of the second defendant for the consideration price of USD24.3 million (share sale transaction).

[7] Amongst the terms of the Hong Kong Memorandum are as follows:

(i) The consideration price for the transaction shall be USD24.3 million and that there shall be no further negotiation on the consideration price;

(ii) a sale and purchase agreement (SPA) of the entire issued shares of Pore-Sia shall be executed on 23 March 2012 incorporating the terms in the Hong Kong Memorandum; and

(ii) the plaintiff shall pay 20% of the USD24.3 million consideration price to the first defendants at the time of the signing of the SPA agreement on 23 March 2012.

[8] Through an e-mail dated 19 March 2012 the first defendant's solicitors notified that the first defendant expressly stated that the first defendant was not prepared to proceed with the SPA if the SPA was not executed on 23 March 2012.

[9] The plaintiff's representatives met the first defendant's representatives on 23 March 2012 in Singapore with the expectation that the SPA will be executed and 20% of the purchase price to be paid as agreed. However, the first defendant refused to execute the SPA and to accept the bank draft of the 20% as part payment of the consideration price. Instead new terms were indicated through the first defendant's new solicitors, Mr Yap Wai Ming of Messrs Stamford. The terms are as follows:

(i) that the bank draft for the 20% part payment be made in favour of the Resort Pore-Sia (Singapore) Pte Ltd; and

(ii) to negotiate new terms.

[10] The first defendant also requested for an increase of the consideration price to USD27 million. The increase was agreed to by the plaintiff on a goodwill basis. Unfortunately the offer by the plaintiff was rejected by the first defendant as it was communicated to them 20 minutes after the deadline.

[11] The plaintiff through its solicitors issued a demand that the share sale transaction proceed as agreed. However, the first defendant failed, refused and/or neglected to do so. The plaintiff filed the suit claiming *inter alia*, that a binding agreement between the plaintiff and the first defendant concluded a sale and purchase of the second defendant's entire issued share and by extension, the said land owned by the second defendant.

[12] To protect its interest on the land the plaintiff entered a private caveat on 4 June 2012 and obtained an injunction on 19 September 2012 restricting the first and second defendant of any dealings with the land and any initiation proceedings for the removal of the caveat. In spite of having notice of the plaintiff's interest the second defendant entered into

an option to purchase with the third defendant for the sale and purchase of a portion of the land. On 11 September 2012 the second defendant and the third defendant entered into a sale and purchase agreement right before the injunction became enforceable.

[13] A sum of RM7,840,800 was paid by the third defendant into the second defendant's bank accounts being 10% of the purchase price as a deposit to the sale and purchase agreement. Part of the said sum was deposited into a Malayan Banking Berhad account and the rest into the second defendant's account.

[14] One of the terms of the SPA is a condition precedent requiring the second defendant to procure the removal of the caveat within 24 months of the SPA failing which the second defendant will be required to refund the deposit and all monies paid under the SPA including reimbursable expenses and interest.

[15] As the plaintiff is seeking specific performance of the sale and purchase of the entered issued shares of the second defendant the CP is significant as it would mean in the event the plaintiff succeeds in the claim it would have to comply with the terms of the SPA.

[16] It is submitted by the plaintiff's counsel that the plaintiff has a fair chance to obtain judgment as there is clear and conclusive evidence that there is a conclusive agreement between the parties.

[17] Based on contemporaneous documents the sum of RM7,840,800 has been banked into the second defendant's accounts as follows:

(i) RM815,443.20 was banked into Malayan Banking Berhad Account No. 001011272396 Johor Bahru; and

(ii) RM3,496,996.80 and RM2,025,356.80 and RM1,503,003.20 paid into the second defendant's other bank accounts.

[18] It is further submitted by the counsel that there is evidence of assets within the jurisdiction and that there is already a real risk of the asset dissipating as some of the funds have been transferred to the sister company in Singapore. This fact is not disputed by the second defendant.

The Second Defendant's Arguments

[19] On 26 February 2013, the second defendant was served through its solicitors the *ex parte* Mareva order. The *ex parte* Mareva order mandated that the second defendant comply with the second part of the *ex parte* Mareva order (either directly and indirectly) within seven days

from the date the *ex parte* Mareva order was served. In other words, the second part of the *ex parte* Mareva order had to be complied with by 5 March 2013.

[20] It is submitted that there is no basis for the plaintiff to have sought the second part of the *ex parte* Mareva order on an *ex parte* basis. The relief sought on the second part of the *ex parte* Mareva order ought to have been considered and granted, if at all, upon hearing all parties concerned. It is also the contention of the second defendant that there is no real prejudice caused to the plaintiff if the second part of the *ex parte* Mareva order is not granted on an *ex parte* basis. Furthermore it is submitted that the plaintiff will not suffer irreparable injury if the second part of the *ex parte* Mareva order is only complied with, if at all there is basis, after 5 March 2013.

[21] Even if the second part of the *ex parte* Mareva order is not set aside or suspended, the plaintiff would effectively obtain the final relief of the second part of the *ex parte* Mareva order depriving the second defendant of any chance to oppose it, as even if the second defendant is successful at setting aside the Mareva order, the second part of the *ex parte* Mareva order would have been satisfied and the information sought by the plaintiff would have been provided. This would amount to an irreparable damage, that cannot be reversed, to the second defendant.

[22] The second part of the *ex parte* Mareva order is unjustifiably oppressive. The plaintiff does not have a good arguable claim, particularly in respect of the second part of the *ex parte* Mareva order.

[23] The plaintiff failed to comply with the mandatory requirements under O. 29 r. 1(2A) of the Rules of Court 2012, particularly in respect of the second part of the *ex parte* Mareva order. There is significant delay in applying for the second part of the *ex parte* Mareva order.

The Law

[24] The Supreme Court in *Creative Furnishing Sdn Bhd v. Wong Koi* [1989] 2 CLJ 93; [1989] 1 CLJ (Rep) 22 sets out the requirements the respondents must satisfy the court in order to get a Mareva injunction. The purpose of such an injunction is to preserve the assets and preventing a defendant from dissipating his assets within jurisdiction before judgment (*Aspatra Sdn Bhd & Ors v. Bank Bumiputra (M) Bhd & Anor* [1987] 2 CLJ 377; [1987] CLJ (Rep) 50). In order to establish the necessary ingredients for an *ex parte* order in particular, it is incumbent on the applicant to make frank and full disclosures of all

material facts. Every material representation must not be misleading, and there must not be any suppression of material facts. Failure to do so at the crucial time of making the *ex parte* application would invariably be fatal (*KSM Credit & Leasing Sdn Bhd v. Datamaute (M) Sdn Bhd & Ors* [1986] 1 CLJ 500; [1986] CLJ (Rep) 414).

[25] In granting Mareva injunction, the test to be applied is whether, after the plaintiff has shown that he has a good and arguable case and after considering the whole of the evidence, the refusal of a Mareva injunction would involve a real risk that a judgment or award in the plaintiff's favour would remain unsatisfied because of the defendant's removal of assets from the jurisdiction or dissipation thereof within the jurisdiction (*Jasa Keramat Sdn Bhd v. Monatech (Malaysia) Sdn Bhd* [1999] 4 CLJ 30).

A Good And Arguable Case

[26] The Court of Appeal in the case of *Biasamas Sdn Bhd & Ors v. Kan Yan Heng & Anor* [1998] 4 CLJ 754 held that a "strong arguable case" meant that the plaintiff has a fair chance of obtaining judgment against the defendant. The plaintiff need not satisfy the court that the plaintiff's case is so strong as to warrant summary judgment nor even a strong *prima facie* case to obtain a Mareva order. The principal issue to be decided at the full trial is whether an agreement was concluded between the plaintiff and the first and second defendants.

[27] The second defendant is a company incorporated in Malaysia and is wholly owned by the first defendant which is a company incorporated in Japan and is outside the jurisdiction of this Honourable Court. The majority of the directors in the second defendant are Japanese nationals.

[28] It is not disputed that the second defendant executed the third defendant's SPA with the third defendant despite having full knowledge of the plaintiff's interest in the land. The third defendant paid a deposit of RM7,840,800 to the second defendant on 11 September 2012.

[29] Based on the facts and evidence I am of the view that the plaintiff has a good and arguable case.

Whether The Defendant Has Assets In The Jurisdiction

[30] There is evidence to show that the second defendant has an account with Malayan Banking Berhad branch in Johor Bahru in which a part of the deposit sum was credited.

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Risk Of Dissipation Of Assets

[31] In the case of *Pacific Centre Sdn Bhd v. United Engineers (M) Bhd* [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 Edgar Joseph Jr J quoted Mustill, J in the case of *Third Chandris Shipping Corporation v. Unimarine SA* [1979] QB 645:

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> The whole object of the Mareva Jurisdiction is that the plaintiff proceeds by stealth, so as to pre-empt any action by the defendant to remove his assets from the jurisdiction.

[32] His Lordship, went on further to say that:

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> ... the plaintiff must adduce sufficient evidence to raise an inference that there is a real risk, or at least a risk, that the defendant will dissipate his asset ...

[33] The second defendant is a company incorporated in Malaysia and is wholly owned by the first defendant which is a company incorporated in Japan and is outside the jurisdiction of this Honourable Court. The majority of the directors in the second defendant are Japanese nationals. From the evidence in the affidavit there is a dissipation of assets. Monies have been transferred from the second defendant's account in Maybank to an account in Singapore. This was not disputed by the second defendant.

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Conclusion

[34] From the facts and evidence adduced it is reasonable to conclude that the plaintiff had succeeded in complying with all the requirements for a Mareva injunction. As such, the application in encl. 72 for an injunction is allowed with costs, with some variations to the prayers. A provision of RM300,000 for the purpose of operating the golf club and golf course. Enclosure 80 is dismissed with cost. Both costs will be cost in the cause.

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